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The right of access to information: Civil society and good governance in South Africa

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Abstract

The right of access to information has been accepted by South Africa as a sine qua non *for a democratic state pursuing the values of accountability, transparency, openness and responsiveness in the affairs of government institutions. The paper points out that South Africa's recognition of this right was informed by the apartheid system of government that was buttressed by the institutionalised violence of state repression through certain obnoxious legislation like the Internal Security Act. Thus post-apartheid South Africa through the 1996 Constitution and other legislation, like the Promotion of Access to Information Act, has empowered civil society to ensure government accountability. Despite the fact that the country's access to information legislation has its shortcomings, which the paper expounds, it is acknowledged that a commendable landmark has been made in the political history of the country.*

Keywords: information access; information access legislation; apartheid era legislation; civil society; good governance; South Africa.

1 Introduction

The recognition of the right of access to information is a central pillar to South Africa's democracy, mainly due to the experience of the past. During the country's struggle for liberation, information became a crucial resource for the liberation forces and their allies, including international solidarity movements, in their efforts to expose the brutality of the apartheid regime and hasten its demise. Media freedom during that time was regularly compromised either through prior censorship of news coverage or through the banning and confiscation of publications. As a result, post-apartheid South Africa has come to value unrestricted access to information as the

cornerstone of open, transparent, participatory and accountable government, which was instilled in the country's new constitution.

2 Civil society and good governance

Good governance may be described as a general array of practices that maximise the common good of a country. According to the United Nations Development Programme (UNDP) the major attributes of good governance include:

- Participation of citizens in the decision-making process of the country;
- Respect for the rule of law, which is the extent to which legal frameworks are fair and impartially administered;
- Transparency, with the free flow of information as its linchpin;
- Accountability where the government, the private sector and civil society organisations (CSOs) are accountable to the general public, as well as to institutional stakeholders (UNDP 1997: 5).

Government, as steward of the resources of the country and also the fountain of enormous patronage, is tempted to corruption and other forms of maladministration. Throughout the world, therefore, CSOs have seized the opportunity with the demise of communism and other forms of totalitarian rule to demand more open, democratic, responsive, and accountable governments. Though the concept, 'civil society', has its inherent ambiguities, both political theorists and practitioners are in agreement in their realisation that it is not State institutions and policy that essentially ensure good governance, but the 'third realm', civil society (Arko-Cobbah 2006: 350). Apart from providing a vital link between citizens and the state, civil society also provides an environment necessary to enhance community cohesion and decision-making with free access to information being of paramount importance. Effective citizen action becomes possible when citizens develop the skills to gain access to information of all kinds and to put such information to effective use, suggests Kranich (2003: 3). Governments should, therefore, provide the necessary legislative framework and other forms of enabling acts to make this possible. Thus, the enactment of formal statutes by governments guarantee their citizens' right of access to government information.

3 Conceptual framework of access to information

Since openness and accessibility of the public to information about the functioning of government has become a vital component of democracy and also an aspect of good governance, South Africa's constitutional right to access of information should be discussed within the general framework of access to information as practised in other democracies. This becomes more important if one considers South Africa 's Promotion of Access to Information Act , Act 2 of 2000 (PAIA) hailed as one of the most progressive pieces of legislation on public access to information in the world.

3.1 The importance of access to information

Access to information is regarded as the ability of the citizen to obtain information in the possession of the state. That is *real* information, which is useful and practical, capable of helping the citizen to make an informed opinion on an issue and not simply being overwhelmed by unlimited amounts of government propaganda. Unhindered access to information, apart from being regarded as an essential ingredient in democratic governance, is also regarded as a fundamental right. Intellectual freedom is a fundamental human right, for without the freedom to think one's thoughts, conceive ideas, formulate views and express them freely there is no possibility of

democratic governance (Byrne, 1999). Section 1 of Article 19 of the Universal Declaration of Human Rights, as adopted by the United Nations (1948), reflects this view in its affirmation that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media regardless of frontiers". Martin and Feldman (1998: 1) have summarised the importance of access to information as follows:

- To render the processes of government more open and make those in power accountable;
- To give meaning to freedom of expression, since one can only express meaningful opinion on an issue when he or she is duly informed.

Emerson (1963: 880) elucidates the importance of information access by looking at it from the angle of freedom of expression, its concomitant, suggesting that it is mainly used:

- As an assurance of individual self-fulfilment;
- As a means of attaining the truth;
- As a method of securing the participation of members of society in social and political decision-making through a process of open discussion;
- To maintain the balance between stability and change in society.

3.2 Basic principles underlying access to state-held information

There is usually a tension between right of access to information held by the state and simultaneously exempting certain records on the basis of state interest. Martin and Feldman (1998: 2) have, therefore, suggested the following basic principles so as to prevent a possible deadlock:

- Acknowledgement in law on the need for limitation of access on the basis of the overall state interests;
- Publication of guidelines by the agencies of the state appraising the public details concerning the applicable rules as to how to access information from these bodies, including the official to be approached for the required information and the possible grounds for refusal;
- Respect of information with regard to individual privacy and data protection;
- Procedure defining review and appeal with regard to refusal of access.

The suggestions by Martin and Feldman, though appearing plausible, are fraught with problems. For instance the definition of 'state interest' tends to be more subjective and often invokes emotive interests, easily exploited by public officials who regard free access to information as unnecessary interference to the orderly working of government. Particularly so in South Africa where, due to apartheid history, criticisms of government actions are sometimes looked upon as racial prejudice and one may easily be labelled as 'an enemy of the state'.

3.3 Antecedents of free access to information

There are both social and infrastructural preconditions that are necessary for the successful implementation of free access to information for a country's people. The preconditions include:

- *Political stability*, rulers of a stable state enjoy sufficient confidence that they are not averse to openness nor citizen involvement in governmental decision-making;

- *Independent judiciary*, that is, a judiciary that is independent, impartial and informed is expected to ensure the realisation of a just, honest, open and accountable government and are more likely to make a ruling that may be contrary to the interests of the government;
- *Communications infrastructure*, does not only refer to physical needs to be established and maintained by the state for both the travel and telecommunications set-up, but also personal development that takes the form of information literacy;
- *Library and information services*, that encourage free access to information through their open-for-all policy and the organisation of official documentation in a manner that enhances easy access to them.

Political stability and the independence of the judiciary, arguably, have a symbiotic effect on free access to information. A spin-off of open government is political stability, just as a judiciary that is independent encourages openness in governance and thus, contributes to political stability. The role played by library and information services in promoting free access to information, though remarkable, is usually neglected, especially in developing countries, such as South Africa. As President Franklin D. Roosevelt once said "Libraries are…essential to the functioning of a democratic society…libraries are the great symbols of the freedom of the mind" (Quoted by ALA, 2002). Public libraries, as rightly pointed out by PubliCA (The Concerted Action for Public Libraries) in its Leuven Communiqué, have a strategic opportunity to increase the quality of life and democratic possibilities for citizens of the Information Societies by providing *free and equal access to high-quality information* (own emphasis) (Aslib 1998: 1).

4 An overview of the South African apartheid ideology

A culture of secrecy was the hallmark of the operations of government in South Africa under the apartheid regime. The operation of government in those days was characterised by the extensive use of repressive security legislation, as well as media censorship.

4.1 Policies and legislation aimed at enforcing apartheid

Bauer (1993: 3) categorises the main structures of apartheid as the following:

- The restriction of the franchise and the virtual monopoly by Afrikaners of centralised state power, although certain commentators often forgot that the ruling class included those Blacks who held important positions, such as chiefs or tribal heads, homeland leaders and their top public officials;
- The forced settlement of large numbers of the black rural population into homelands, as well as residential, business and social segregation in terms of the Group Areas Act of 1950;
- The enforced regulation of the supply of labour to the mines, factories, farms and white domestic households;
- The government's capacity to enforce social control, especially in the urban areas.

4.2 Apartheid era legislation and free access to information

South Africa had an abnormal load of security legislation deemed necessary for a so-called 'normal society' during the apartheid era. Bauer (1993: 27) describes it as "a profusion of security legislation which included a statutory invasion of human rights".

After the Sharpeville shootings in 1960, the apartheid regime made use of repressive security legislation and extensive emergency powers to curb popular resistance to the apartheid rule.

4.2.1 The Suppression of Communism Act

The *Suppression of Communism Act* of 1950 though promulgated earlier, was invoked alongside the Public Safety Act of 1953 to declare a state of emergency. Measures taken under the legislation included declaration as an offence, the utterance, issuance or distribution of any subversive statement likely to undermine the authority of the Government. Powers were also granted to the Minister of the Interior to order any newspaper or periodical to cease publication if the Minister considered that there had been a systematic publication of matters of subversive nature, a siege on free access to information (Republic of South Africa 1950).

4.2.2 The Internal Security Act

The *Internal Security Act* of 1982, which was a consolidation of a number of security legislations such as the *Internal Security Act of 1950*, the *Unlawful Organisations Act of 1960*, the *Terrorism Act of 1967* and the *General Law Amendment Act of 1962* aimed at, among other things, the prohibition of certain publications and the quoting of banned persons (South Africa 1982). In terms of Section 15 of the Act, the Minister of Law and Order was authorised to make the registration of a newspaper conditional upon the payment of an amount up to R40,000 (about US$ 7,000) as a kind of guarantee of good behaviour. If the publication was subsequently banned in terms of Section 5 of the Act, the amount was forfeited (Bauer 1993: 20). A corollary of this provision was that a number of newspaper and other periodical proprietors, especially the Black publishers who wanted to run publications, had to shelve their plans because the stakes were regarded as too high. The Act, therefore, provided a major assault on freedom of information under the apartheid government.

4.2.3 The Publications Act

The *Publications Act* of 1974 became South Africa' s main instrument for restricting access of information in the country. Its provisions paved the way for the development of a powerful and elaborate use of state mechanisms to control publications, films and entertainment. In terms of the Act, the distribution, publication or exhibition of publications, films or entertainment considered to be undesirable, were prohibited (South Africa 1974). The question was: who defined an undesirable publication?

Despite the legislative onslaught on freedom of information provided by the above legislation it was particularly the State of Emergency declared on 12 June 1986 and 11 December 1986 that provided a major curb on press freedom and, thus, severely restricted access to information in apartheid South Africa. For instance, under the State of Emergency, journalists, news reporters, film producers etc. were prohibited at any unrest scene, without first obtaining permission from a commissioned officer. Furthermore, the publication of any security action that took place in an unrest situation became prohibited and the Bureau for Information was created to serve as the sole source of news with regard to the unrest situation (Wikipedia 2007).

5 Access to information in post-apartheid South Africa

The Presidency of F. W. de Klerk in 1989 saw some changes to the Internal Security Act, among which was the scrapping of the ban on publications and restrictions imposed on newspapers. The Constitution of the Republic of South Africa Act 200 of 1993 (the interim constitution) and the subsequent 1996 Constitution, Act 108 of 1996, provided the necessary legislative opportunity for South Africans to have unhindered access to information.

5.1 The constitutional right of access to information

In the interim constitution, the chapter containing the Bill of Rights provided that "Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise of protection of any of his or her rights" (Section 23 of Act 200 of 1993). Rather more profoundly, the Constitutional Principle IX in Schedule 4 required that "Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government". The implication of this proviso, according to O'Regan (2000: 12) was that the text of the final Constitution, the 1996 Constitution of the Republic of South Africa Act 108 of 1996, had to provide for freedom of information, otherwise the text would not be certified by the Constitutional Court. The 1996 Constitution of South Africa in its Preamble "lays the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law" (Republic of South Africa 1996: 2). The Constitution, therefore, requires open, accountable and responsive government and this, undoubtedly, demands the right of the public to have access to government-held information. South Africa's conception of democracy is, therefore, fundamental to the Constitution in two ways:

- By ensuring that citizens are informed of governmental activities to enable them to make informed choices in the course of exercising their democratic rights;
- The right of access to information is central to the task of ensuring that public power is exercised legitimately and fairly.

Section 32 of the Constitution of 1996, therefore, states that "Everyone has the right of access to (a) any information held by the state, and (b) any information that is held by another person and that is required for the exercise or protection of any rights; (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state" (Republic of South Africa 1996). The Section, therefore, affirms the fundamental right of access to information and seeks to promote a culture of transparency and accountability both in the public and private sectors.

5.2 The Promotion of Access to Information Act

The Promotion of Access to Information Act 2 of 2000 (PAIA) and the Promotion of Administrative Justice Act (PAJA) are parts of the legislation passed in 2000 in order to comply with the obligations contained in Section 9 (4) and Section 32 (2) of the Constitution. The primary intention, ironically, is not to give the government more power, but rather to constrain and structure the manner in which government exercises the power that it already possesses.

5.2.1 The aims and objectives of the Promotion of Access to Information Act

PAIA aims at creating the framework and regulations that allow the public to access the records being held by government on their behalf and also the records of the private sector needed to exercise or protect any right. Section 9 of the Act, according to Dimba (2002: 3-4) clearly sets out the objectives of PAIA as follows:

- To give effect to the Constitutional Right to Access Information as set out in Section 32 of the Constitution;
- To generally promote transparency, accountability and effective governance of public and private institutions;
- To put in place voluntary and mandatory mechanisms or procedures aimed at enabling information requesters to obtain access to records held by both the State and private bodies as swiftly, inexpensively and effortlessly as reasonably possible;
- To regularise the need for certain justifiable limitations, such as privacy, commercial confidentiality and effective, efficient and good governance;
- To empower and educate the public to understand their right to access information, so as to exercise such rights in relation to public and private bodies, to understand the functions and operation of public institutions and to effectively scrutinise and participate in the decision-making process in the country.

5.2.2 General provisions of the Promotion of Access to Information Act

The opening statement of the Promotion of Access to Information Act (PAIA), states as its purpose "To give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and provide for matters connected therewith" (Republic of South Africa 2000: 2). PAIA is lauded as one of the few pieces of information access legislation the world over that is progressive enough to apply to both public and private sectors, as well as to records, irrespective of when the record came into existence. Its application also restricts "the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record…and is materially inconsistent with an object, or a specific provision, of this Act" (Section 5).

The Act, furthermore, sets out a series of enabling provisions for information requesters, among which is that the requester's right of access is not affected by "any reason the requester gives for requesting access" or by the relevant information officer's "belief to what the requester's reasons are for requesting access" [(Section 11(3)].

Public and private organisations are requested by PAIA to publish manuals describing their structure, functions, contact information, access guide, services and description of the categories of records held by the organisation. The manuals, to be submitted to the SAHRC, are to be published in the Government Gazette by February 2003. The SAHRC is designated to see the functioning of the Act and it is required under law to issue a guide on the Act and submit reports to Parliament. The Commission is also expected to promote the Act, make recommendations and monitor its implementation (Sections 83 and 84).

5.3 Legislative challenges facing the Promotion of Access to Information Act

The advent of PAIA, as stated elsewhere, is to counteract one of the main characteristics of the apartheid regime, that is, the state's obsession with official secrecy. Governments usually feel uncomfortable with the notion of transparency and would rather, to a greater or lesser extent, prefer to operate beyond the glare of public scrutiny. The recent discovery of the secrecy surrounding the United States' rendition of suspected terrorist prisoners is a case in point. Similarly, in apartheid South Africa, government secrecy virtually became a way of life. It is, therefore, of no surprise that a series of legislation existed both in the apartheid (to a greater extent) and to a limited extent, in the post-apartheid era, to protect official secrets. This section, therefore, aims at taking a cursory look at some of these laws, as pointed out by McKinley (2003: 5-8).

5.3.1 The Protection of Information Act

The Protection of Information Act of 1982 (PIA) was due to the authoritarian and secretive apartheid state. It was aimed at dealing with classification and de-classification of government information. The Act is deemed contrary to the openness and transparency of information as required by PAIA. It needs to be noted that as long as PIA remains in the statute books, there will be constant conflict between its 'regime' of information protection and PAIA's 'regime' for information disclosure and accessibility, despite the stated intention of the override clause in PAIA.

5.3.2 The National Archives of South Africa Act

An area of potential confusion between the National Archives of South Africa Act of 1996 (NASA) and PAIA is the time periods prescribed for the automatic release of information. NASA provides that only archival information that is more than twenty years old should automatically be made available to the public. The National Archivist, however, has the power to identify records that might be made available sooner. PAIA, on the other hand, provides for no such time limitation. Sections 14 and 15 of PAIA leave that to the public and private bodies that hold the information, to decide and then make it publicly known through their respective information manuals the type of information that may automatically be made available. This apparent contradiction poses a problem of interpretation as to which access provision is to be followed by holders of information and the one ultimately in charge of making decisions about the availability of 'sensitive' information.

5.3.3 The Minimum Information Security Standards

The Minimum Information Security Standards of 1996 (MISS) is an official government policy document that sets the standards for all government organisations that handle sensitive and/or classified information in order to ensure that the public interest is protected. MISS classifies information into *Restricted, Confidential, Secret* and *Top Secret* that needs to be followed by government agencies when handling 'sensitive' information. The classification, just like PIA as stated above, is at variance with the access and intent of PAIA.

5.3.4 The Legal Deposit Act

The Legal Deposit Act 54 of 1997 (LDA) requires all published materials in South Africa to be deposited with certain state institutions such as the national archives and libraries. It allows the head of a place of legal deposit to dispose of, omit from catalogues, inventories and a national bibliography or impose restrictions on access to certain categories of documents [(Section 7)(3)]. The possibility of another form of censorship may, thus not be ruled out under this Act.

5.3.5 The Protected Disclosures Act

The Protected Disclosures Act 26 of 2000 (PDA), euphemistically labelled the *Whistle-blower Act*, provides legal cover to employees who might disclose information with regard to unlawful conduct by their employers or agents. If the Act is related to PAIA, the following areas of concern come out fully:

- The grounds for disclosing information around "irregular conduct" depends on the official interpretation; thus , whereas a 'whistle blower' would be protected under PDA for internally disclosing such information, no legal imperative is provided by PAIA for that information to be disclosed;
- PDA makes provision for an exception clause to protect disclosure by an employee with regard to a "breach of the duty of confidentiality of the employer towards any other person". In combination with the "commercial confidentiality" clause in PAIA, this exception, in the words of McKinley (2003: 8) "presents a double barrier restriction to the right of access to information".

5.3.6 The Promotion of Equality and Unfair Discrimination Act

The intention of the Promotion of Equality and Unfair Discrimination Act 4 of 2000 (PEUDA) is to prevent and prohibit hate speech. Section 12 of the Act prohibits the dissemination or publication of any information that could reasonably be construed as or understood to show the intention to unfairly discriminate against any person. This provision contradicts with the PAIA provisions if, for example, someone researching discrimination disseminates such information. In terms of PEUDA the person would be committing an offence, but should that person not disclose the information then PAIA is rendered powerless. Moreover, the general override clause in Section 5 of PAIA conflicts with the one contained in PEUDA [Section 5(2)] which states that "If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail". The constitutional right of access is, therefore, set against the constitutional right of equality in specific relation to associated information.

5.3.7 The Promotion of Administrative Justice Act

Section 33 of the Constitution makes provision for a right of administrative action that is "lawful, reasonable and procedurally fair". The Promotion of Administrative Justice Act 3 of 2000 (PAJA) and PAIA, therefore, give effect to the above constitutional rights, thus promoting values of transparency and accountability, which are critical instruments for reducing mismanagement, waste and corruption (Langa 2004: v). A decision to grant or refuse a request for information under PAIA is an administration action and therefore, subject to the provision of PAJA. Despite this,

Section 1 of PAJA provides for exceptions to certain administrative actions, thus allowing for exemption from provisions of PAJA, administrative decisions to grant or not to grant a request for access to information under PAIA.

5.4 Information management: The Promotion of Access to Information Act

One can readily discern the profound impact PAIA would have, in general, of the terrain of information management in South Africa. For the Act to succeed, a good information management system needs to be put in place. Not unexpectedly, PAIA appears to be a burden to both public and private organisations that do not have comprehensive and effective information management systems. Speaking in ideal terms, the ability to comply with the Act should rather have a positive side-effect of good information management policies and systems. Unfortunately, this is not the case. Apart from improving record management, steps that public and private organisations need to take to enable them to comply with the Act, including the drafting of manuals, as identified by Marais and Fanaroff (2002: v-vi) are the following:

- To map all records (at a high level);
- To categorise the types of records and the subjects covered;
- To develop clear policies regarding what records will be automatically available to the public, what will be available on request and what will be refused (for logical and cogent reasons) so as to help organisations to understand what really needs to be confidential and what does not;
- To develop procedures and standard forms to deal with requests;
- To ensure that the people in the organisation who have to deal with information and requests understand how to do so;
- To develop clear policies for the ongoing categorisation and storage of records;
- To ensure that the people in the organisation follow these procedures.

The above expectations enjoin the library profession to ensure the effective implementation of PAIA. Regrettably, such a challenge seems not to have been fully taken up by the profession. For example, the advocacy role of the Library and Information Association of South Africa (LIASA) the professional grouping of South African librarians, if at all, has been very minimal. Perhaps, the association may wish to take a cue from its Jamaican counterpart, the Library and Information Association of Jamaica (LIAJA) which, in recognition of the gap between the providers and users of information, collaborated with public libraries and submitted a statement to the Joint Select Committee of Parliament for the Review of the Access of Information Act suggesting, among other things, that public libraries in Jamaica be incorporated into the framework for the dissemination of information by sensitising the public and creating an awareness of the existence of the Act. Furthermore, and more importantly, public libraries to provide locations where the public may learn what the Act offers and serve as access points for receiving requests and the delivery of documents (Durrant 2006: 6). One may even go further to suggest that the various library schools in South Africa may, occasionally, redeploy their students in the receipt and processing of information requests under PAIA as part of the field or practical work of their studies. Apart from strengthening the advocacy role of the library profession in respect of the effective implementation of the Act, the students will get first-hand information of some of the problems ordinary citizens face in

exercising their rights under PAIA and will contribute to making information requests both cost- and time-effective.

5.5 Other challenges facing the Promotion of Access to Information Act

Arguably, free access to information is, fundamentally, a change process that needs to be managed in its social circumstances, rather than a simple legislative imperative. Dick (2005) captures this assertion in his '*power is information'*, rather than the widely-held view of '*information is power'* analysis in response to the Ingwersen-Jarvelin-nested model as applied in context to PAIA. Darch and Underwood (2005: 78), similarly, identify capacity and willingness to comply, as two key components of organisational compliance to freedom of information and further suggest that demand for information is influenced by such imponderables as affordability, public awareness of civil and human rights, levels of information literacy, the coherence of national political discourse and the perceived chance of success. It is against such 'imponderables' that South Africa's PAIA may be measured to ascertain as to whether it is achieving its intended objective, which is the promotion of unhindered access to information to its citizenry.

5.5.1 Recorded information

PAIA is limited only to recorded information, leaving out *all* other types of information that are not contained in a record. This is in direct contradiction to Section 32 of the Constitution, which stipulates that "everyone has the right of access to **any** information" (own emphasis). Furthermore, the constitutional right and the title of the Act, despite the use of the word 'information ', legislates only a right and the procedures to access 'records' in the Act. Thus, if information is not kept in a record, the Act cannot be used to obtain it (Freedom of Expression Institute 2003: 14). One possible way of circumventing the creation of permanent, written records and thus defeating, to some extent, the objectives of PAIA, especially by public officials, is the tendency to make more use of oral presentations or to use e-mail (that may easily be deleted).

5.5.2 The requesting process

PAIA gives 30 days to organisations to respond to information requests and another 30 days extension, in case there is a need for more time to respond to complex information requests. Section 74 of the Act makes provision for an internal appeal within 60 days, the decision of which should be made known to the information requester within 30 days of the filing of the notice of internal appeal. It is only after exhausting this internal appeal facility that the information requester may take the appeal decision to a High Court. This two-tiered appeals process route is lengthy, expensive and certainly prohibitive to many South Africans. As pointed out by the Open Society Institute Justice Initiative (OSIJI) "if the PAIA is to work, and particularly in favour of vulnerable communities and groups, it is essential that its enforcement procedures are inexpensive, quick and easy to use" (OSIJI, 2004).

It has, therefore, been suggested that the creation of an independent ombudsman or information commissioner, who makes a recommendation about disclosure, can facilitate the process of access to information, making it easier and inexpensive, both in terms of time and money (Roberts 2002: 12).

5.5.3 Lack of culture of openness and transparency

When Darch and Underwood (2005: 78) argue that despite its global outlook, the promotion of access to information, on closer examination, is influenced by local values, they seem to be making a valid point. South Africa's introduction of PAIA was influenced by a constitutional imperative rather than by popular pressure. Free access to information is fundamental to freedom and democracy because it promotes and stimulates good governance, which includes public participation in the political process. Adversarialism and malicious non-compliance with the Act may be rooted deeply in the country's culture of secrecy and what Dick (2005: 6) describes as "bureaucratic arrogance and hostility". A naturally secretive public servant may credibly claim a lack of resources or any other reason considered convenient, as a strategy for the effective denial of access to information. No doubt, that despite the generous time frames provided by PAIA to officials to respond to information requests, mute refusals accounted for 63% of information requests made under the Act in 2004 (OSI JI 2004: 3). Much as one would like to agree with the observation that the local propensity to be secretive mars the efficacy of information access, it is important to note that South Africans have seen much repression, including organised misinformation such as the *Muldergate* or the *Information Scandal*, that occurred during Prime Minister Vorster's rule. Therefore, the culture of secrecy surrounding government operations, should have in reality, been regarded as something of the past and the opportunity seized to fully support the effective implementation of PAIA.

5.5.4 Mandatory and discretionary exemptions

According to PAIA, a request for access to records in both public and private bodies may be refused on the grounds of "mandatory protection of commercial information of third party" (Section 36 and 64). Giddens' (2000: 55) so-called "structural pluralism" and its threat to free access to information have also been articulated by Roberts (2002). The provision of the mandatory protection of commercial information of a third party has the potential of preventing access to information on the nebulous grounds of "commercial confidentiality", even though the requested information may emanate from governmental initiatives like privatisation and/or out-sourcing, which fundamentally affect the realisation of certain socio-economic rights (Roberts 2000: 2).

Apart from the grounds for information refusal specified above, no specific guidelines are provided by PAIA to enable an information officer to make a distinction between that which is mandatory and that which is optional, thus leaving the field of interpretation wide open for refusing access to centrally important spheres of information, including information that involves human rights violations (McKinley 2003: 5).

5.5.5 Exemption of certain official records

Section 12 of PAIA grants exemption to the records of certain state organs such as "the Cabinet and its committees", the judiciary and a Special Tribunal and "an individual member of Parliament or of a Provincial legislature in that capacity". Much as maintenance of secrecy of information with regard to internal deliberations about policy or the management of public institutions is necessary so as to encourage open and frank discussions on policy issues, there is the need for the records to be released, expeditiously, after some time, especially, not long after the policy has been finalised. The reason is that this is necessary for the purposes of accountability. The

recent rumpus over the former Deputy President's (Jacob Zuma) court case, particularly, with regard to the letter purported to have been written by Mr Zuma urging the National Assembly not to entertain any request to probe into the arms procurement deal which, according to him, was upon instructions from the President, could have quickly been revealed if cabinet deliberations had not been granted an exemption under PAIA. In any case, to deny right of access to Cabinet records, in particular, makes it difficult for the general public to follow the process used by a very powerful public institution that is privileged to make decisions that affect their lives. It is also a strong indictment of the lack of public participation on policy-making and thus, good governance, and totally inconsistent with the constitutional right of access to "any information" held by a public body.

5.5.6 Information literacy and awareness

Free access to information needs to be part of the democratic culture of a country and this demands an information-literate society. An information literate culture is built up over a number of years through citizenship education and various forms of awareness campaigns. South Africa's democratic culture is just over a decade old and one would expect more intensification of democratic teachings and awareness to off-set the decades of apartheid rule and totalitarianism. Unfortunately, not much emphasis is placed on citizenship education and allied teachings in democratic governance, including the promulgation of PAIA. Although public servants and information officers are being trained on the Act, the bulk of the population remains unskilled in carrying out this exercise. As observed by OSIJI (2004: 9) "training, education and awareness will therefore ensure that there is a supply and demand, which will hopefully instil a new culture of transparency and open government". Moreover, constant newspaper reporting of issues surrounding the Act will help in enlightening the general public about the efficacy of the law.

5.5.7 Lack of organisational capacity and resources

South African Human Rights Commission (SAHRC), the organisation charged with overseeing the implementation of PAIA admits that though the obligation to implement the Act is laid on both public and private organisations, many of these "do not have the capacity and the resources to carry out most of their obligations" (SAHRC 2003: 63). These resources range from human to telecommunications infrastructure development, especially, information communications technology.

6 Conclusion

South Africa's right of access to information was informed by the apartheid system of government that was buttressed by the institutionalised violence of state repression. The Internal Security Act and other legislation which, among others, gave the State wide powers of detention without trial, the banning of persons, organisations, gatherings and publications and of imprisonment for various political actions and other racially discriminatory laws and practices, influenced the drafting of the post-apartheid constitution. Therefore, the 1996 Constitution and the *Promotion of Access to Information Act*, Act 2 of 2000, in spite of various shortcomings, represent both an opportunity and a challenge in the consolidation and extension of the democratisation process in the country. It should be borne in mind that to make the law work in practice is a two-way responsibility. Access legislation will be ineffective if civil society does not have the capacity to exercise its right of access. The government should therefore, deploy resources to create an enabling environment that will

facilitate a proficient response to information requests. Elements of civil society should also generate requests and actually use the law. In other words, South Africa's information access legislation, lofty as it appears to be, is unlikely to have any real impact unless more steps are taken to build capacity within civil society, to train public officials to comply with the legislation even when it tests the limits of the law and encourage a broader participation of people in the processes of government that affect their lives.

References

American Library Association. 2002. "*Libraries: the cornerstone of democracy"*, ALA, available at: http://archive.ala..org/kranich/democracy.html (accessed 30 July 2006).

Arko-Cobbah, A. 2006. Civil society and good governance: challenges for public libraries in South Africa. *Library Review*, Vol. 55 No. 6, pp. 349-362.

Aslib.1998. The Leuven Communiqué. Vol.11 No. 9, November, pp. 1-2, available at: www.aslib.co.uk/notes/1998/nov/industry/09.html (accessed 31 March 2006).

Bauer, C. 1993. The securocratic nature of South African society under apartheid. *Occasional paper No. 3. Paper presented at the biennial conference of the South African Political Science Association held in Bloemfontein 20-22 October 1993.*

Blanton, T. 2002. The world's right to know. *Foreign Policy* July/August pp. 50-57.

Byrne, A. 1999. Libraries and democracy. *Keynote paper for seminar on Libraries and Democracy*, 4 November 1999, Stockholm, Sweden, available at: www.ifla.org.sg/faife/paper/others/byrne3.htm (accessed 31 March 2006).

Darah, C. and Underwood, P. G. 2005. Freedom of information legislation, state compliance and the discourse of knowledge: the South African experience. *The International Information & Library Review* Vol. 37 pp. 77-66.

Dick, A. L. 2005. Power is information: South Africa's Promotion of Access to Information Act in context. *Mousaion* 23 (1): 1-18.

Dimba, M. 2002. A landmark law opens up post-apartheid South Africa, available at: http://www.freedominfo.org/features/20020717.htm (accessed 31 March 2006).

Durrant, F. 2006. Openness, access to government information and Caribbean governance.
http://www.firstmonday.org/issues/issue11_7/durrant/ (accessed March 2007).

Emerson, T. I. 1963. Toward a general theory of the First Amendment. *The Yale Law Journal*, Vol. 72 pp. 887-956.

Fanaroff, B. and Marais, P. 2002. "Foreword", in Currie, I.and Klaaren, J. *The promotion of access to information commentary*, Claremont, Siber Ink.

Freedom of Expression Institute. 2003. *Know your rights: Access to information handbook.* A Veriava (Compl.) Braamfontein: Freedom of Expression Institute.

Giddens, A. 2000. *The third way and its critics*. Cambridge: Polity Press.

Kranich, N. 2003. Libraries: the information commons of civil society, in Schuler, D. (Ed.), *Shaping the Network Society*: Massachusetts: MIT Press.

Langa, P. 2004. Foreword, in *The right to know: South Africa's Promotion of Administrative Justice and Access to Information Acts*, Lange, C. and Wessels, J. (Eds.), Cape Town: Siber Ink.

Martin, R. and Feldman, E. 1998. *Working Paper: Access to information in developing countries: a study prepared for Transparency International*, available at: http://legacy.transparency.org/working_papers/martin-feldman (accessed 31 March 2006).

McKinley, D. T. 2003. *The state of access to information for South Africa: Prepared for the Centre for the Study of Violence and Reconciliation*.

Open Society Institute Justice Initiative. 2004. *South Africa's summary country: 2004 Monitoring Study.*

O'Reagan, K. 2001. Democracy and access to information in the South African Constitution: So9me reflections: *Paper presented at the Conference Constitutional Right of Access to Information, St. George Hotel, Old Pretoria Road, Rietvlei Dam, 4 September, 2000,* Johannesburg: Konrad-Adenauer-Stiftung.

Republic of South Africa. 1950. *Suppression of Communism Act (Act44 of 1950),* Pretoria: Government Printer.

Republic of South Africa. 1974. *Publication Act (Act 42 of 1974),* Pretoria: Government Printer.

Republic of South Africa. 1982. *Internal Security Act (Act74 of 1982),* Pretoria: Government Printer.

Republic of South Africa. 1982. *Protection of Information Act (Act 84 of 1982),* Pretoria: Government Printer.

Republic of South Africa. 1993. *Constitution of the Republic of South Africa (Act 200 of 1993),* Pretoria: Government Printer.

Republic of South Africa. 1996. *Constitution of South Africa (Act 108 of 1996),* Pretoria: Government Printer.

Republic of South Africa. 1996. *Minimum Information Security Standards of 1996,* Pretoria: Government Printer.

Republic of South Africa. 1996. *National Archives of South Africa Act (Act43 of 1996),* Pretoria: Government Printer.

Republic of South Africa. 1997. *Legal Deposits Act (Act 54 of 1997),* Pretoria: Government Printer.

Republic of South Africa. 2000. *Promotion of Administrative Justice Act (Act 3 of 2000),* Pretoria: Government Printer.
Republic of South Africa. 2000. *Promotion of Equality and Unfair Discrimination Act (Act 4 of 2000),* Pretoria: Government Printer.

Republic of South Africa. 2000. *Protected Disclosures Act (Act 26 of 2000),* Pretoria: Government Printer

Roberts, A. 2002. Right to information and Jamaica's Access to Information Act. http://www.aroberts.us/documents/papers/jam_atia_assess.pdf. (accessed March 2007).

Roberts, A. 2002. Structural pluralism and the right to information. http://www.aroberts.us/documents/chapters/Roberts_sprti_odac_2002.pdf. (accessed March 2007).

South African Human Rights Commission (SAHRC). 2003. PAIA annual report to Parliament. In *SAHRC 7th Annual Report April 2002-March 2003* pp. 57-73.

UNDP. 1997. *Governance for sustainable human development: a UNDP policy document.*
Available at: http://www.magnet.undp.org/policy/default.htm (accessed March 2006).

Wikimedia Foundation. 2007. History of South Africa in the apartheid era. *Wikipedia the free encyclopedia*.
http://www.en.wikipedia.org/wiki/Apartheid (accessed March 2007).

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